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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 537

GREAT AMERICAN INDEMNITY COMPANY,
Petitioner,

versus

LYMAN FLENIKEN, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS, LYMAN FLENIKEN AND MRS. LYMAN FLENIKEN

PAUL M. PETERSON,
Columbia, Missouri,

Counsel for Respondents,
Lyman Fleniken and Mrs.
Lyman Fleniken.

BERT E. DURRETT,
CALVIN E. HARDIN, JR.,
Baton Rouge, Louisiana,

BOYLE G. CLARK,
LEE CARL OVERSTREET,
Columbia, Missouri.

Of Counsel for Respondents:

FRANKLIN PRESS BATON ROUGE

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STATEMENT

The statement set out in the petition for the Writ of Certiorari is substantially correct. We call attention, however, to the fact that the petition states that the Judge of the District Court entered judgment on July 23, 1943, "in pursuance to the mandate of the Circuit Court of Appeals dated May 26, 1943." It is the position of respondents that the mandate of the Circuit Court of Appeals did not direct the entry of the judgment entered by the District Court on July 23, 1943. It is upon this issue that petitioner is asking this Court to take jurisdiction.

THE QUESTION PRESENTED

The sole question is whether respondents were entitled to notice and an opportunity to be heard upon the matter of the District Court entering judgment on the mandate.

ARGUMENT

After the mandate of the Circuit Court of Appeals in the case entitled Great American Indemnity Company, Appellant, vs. Lyman Fleniken, et al, Appellees, No. 10247 on its docket (R. 3), was received by the District Court, petitioner here, appellant in that cause, filed a motion in the District Court to set aside the judgment entered on December 4, 1941, and praying for entry of a judgment in its favor "in accordance with the instructions contained in the opinion of the United States Circuit Court of Appeals" (R. 13).

It is admitted that no notice was given to respondents of the filing of this motion for judgment or of the entry of the judgment.

The failure to give notice is a violation of Rule 6 (d) of the Rules of Civil Procedure which provides for the giving of notice of hearing on a written motion not later than five days before the time allowed for the hearing. It violates Rule 5 (a) of the Rules which requires every pleading subsequent to the original complaint to be served on parties affected thereby and it violates Rule 55 (b) of the Rules which provides that a default judgment shall not be entered against a party who has appeared in the action until he shall be served with written notice of the application for judgment at least three days prior to the hearing on such application.

Petitioner seeks to avoid its failure to comply with these

rules on the ground that the mandate of the Circuit Court of Appeals directed and commanded the District Court to enter judgment for it and that the entry of judgment for it was a ministerial duty which should have been performed by the District Court without application on the part of petitioner. Therefore, if the mandate of the Circuit Court of Appeals sent down in Cause No. 10,247 did not direct and command the District Court to enter the judgment entered by it, so that the entry of judgment was nothing more than a ministerial duty, all contentions of petitioner must fail and there is no error in the judgment which the petitioner seeks to have reviewed.

The mandate of the Circuit Court of Appeals on its face did not direct entry of judgment for petitioner.

It reads (R. 4):

> "On Consideration Whereof, It is now here Ordered and Adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court for further and not inconsistent proceedings;"

The opinion of the Circuit Court of Appeals contained the following wording:

> "The motion of defendant appellant for a verdict in its favor should have been granted. The judgment is reversed and the cause is remanded for further and not inconsistent proceedings." (R. 13).

Petitioner contends that, in view of the court's finding that the motion for a directed verdict should have been granted, the mandate must be considered as a direction to the District Court to enter judgment for the petitioner.

The Court of Appeals, however, which issued the mandate, stated in the opinion, sought to be here reviewed, that it was not that court's purpose and intent to direct the District Court to enter judgment on the motion for directed verdict but that it was remanded to the District Court for such proceedings as it thought proper and not in conflict with the finding of the Appellate Court.

It would seem that any question as to the intent of the mandate would be put at rest by this declaration by the Court which issued the mandate.

However, petitioner insists that, regardless of the purposes and intent of the Court of Appeals which wrote the mandate, because of the wording in the opinion, the mandate must be construed as an order to the District Court to enter judgment and the District Court must do so as a ministerial duty.

In support of their contention they rely upon three cases, *Herzberg's, Inc. vs. Ocean Acc. & Guarantee Corporation*, 132 Fed. 2d 438; *Pike Rapids Power Company vs. Minneapolis St. P. and S. S. M. Ry. Co.*, 106 Fed. 2d 891, and *Carter vs. Thornton*, 109 Fed. 2d 316.

We submit that nothing said in these three cases supports petitioner's contention that under the mandate the District Court was required to enter judgment for petitioner as a ministerial duty.

In the *Herzberg* case, *supra*, the sole question on appeal was whether or not a loss was covered by the terms of an insurance policy. The case was reversed upon a mandate similar to the wording of the mandate at bar. The lower court permitted a new petition to be filed seeking to reform the contract and tried that case. A majority of the Circuit Court of Appeals

were of the opinion on the second appeal that the effect of the opinion and mandate on the first appeal was to require the entry of a judgment for the defendant because *"every issue of law and fact raised by the pleading had then been tried."* (Emphasis ours.) However, that court was of the opinion that the mandate was not sufficiently definite even under the facts in that case and reviewed the case on its merits.

The *Herzberg* case merely holds that a court is without power to do anything which is contrary to either the letter or spirit of the mandate construed in the light of the opinion deciding the case. It does not rule that the trial court was required to enter judgment as a ministerial act even though it might appear that the law upon which the Appellate Court passed had been changed or that the plaintiff upon a new trial might easily make proof of matters held necessary to establish his case. There is certainly nothing in the case to sustain petitioner's contention that Respondents were not entitled to notice of the entry of judgment.

The *Pike Rapids Power Company* case, *supra,* is not in point. On the first appeal of that case, a condemnation proceeding, the Appellate Court allowed damages to the land owner which were rejected by the trial court and reversed the judgment in part and affirmed it in part. The question on the second appeal was whether or not the trial court violated the mandate in the entry of judgment and the court held that it had not. The question of the right of the Appellate Court to grant a new trial when it finds the verdict unsupported by the evidence was not involved and the case affords petitioner no authority for its contention.

The *Carter* case, *supra,* is entirely distinguishable because there the Appellate Court in the mandate gave directions to

enter a decree in favor of appellant. In that case the opinion said:

> "The judgment appealed from is reversed and the case remanded *with directions to enter a decree in favor of appellant.*" (Emphasis ours.)

On January 12, 1938, a decree in that form was entered in the Appellate Court. 109 Fed. 2d, 1. c. 318.

The Appellate Court having remanded the case with specific directions to enter a specific decree which was found and entered above, the trial court was in an entirely different position than in this case where the cause was remanded for proceedings not inconsistent with the decision of the Appellate Court. But in that case the Court for the 8th Circuit again announced the rule that on remand the trial court is free to pass upon any issue which is not expressly or impliedly disposed of on appeal.

We respectfully urge that there is nothing in the three cases cited by petitioner to support its contention that the mandate at bar directed entry of judgment for petitioner as a ministerial act and without any notice to Respondents of the action taken on the mandate.

The Appellate Court having ruled against Respondents on the law, although it might have done so **did not preclude them from having a new trial if in the opinion of the District Court it should be given.** In any event Respondents were entitled to notice of the motion and the entry of any judgment.

The only way the petitioner can hope to support its contention in view of the Court of Appeal's ruling upon its own mandate, is that under the present rules of Civil Procedure an appellate court is helpless and without authority to grant

a new trial in any case in which it finds the evidence before it is insufficient to support the verdict. That would mean that the Appellate Court **would be required to direct a verdict** against the plaintiff in every case in which there might be found a failure of some technical proof, such as, failure to prove death was the direct result of the alleged negligent act or failure to introduce in evidence the note sued upon, even though the record might disclose that such proof could easily and readily be made upon another trial. We do not believe that even petitioner would go so far as to urge that in every case which is reversed for lack of evidence to support the verdict, the Appellate Court **is bound** to direct entry of judgment for the defendant. But unless that is the law the writ in this case must be denied.

Prior to the adoption of Rule 50, Rules of Civil Procedure, after a verdict was rendered, neither the trial court nor the appellate court could direct a verdict for the defendant. A new trial was mandatory when a judgment was reversed for failure of evidence to support it. Under Rule 50 the motion for directed verdict is saved and may be acted upon after a verdict is rendered. The rule in part provides "If a verdict was returned the court may allow the judgment to stand or may reopen the judgment **and either order a new trial** or direct the entry of judgment as if the requested verdict had been directed." (Emphasis ours.)

Under the present rule it is therefore held that when a judgment is reversed by the Appellate Court for lack of evidence that either the Appellate Court or the trial court may then enter judgment as though the requested verdict had been directed. Petitioner would seek to have this rule so construed **as to require** the court to grant the requested directed verdict whenever for any reason a verdict is set aside as not being

supported by the evidence. That certainly is not to be found in the language of the rule and we submit cannot and should not be implied. The purpose of the rules is to aid in rendering justice. Such a construction would defeat the purpose of the rules.

Rule 59, Rules of Civil Procedure, providing for new trials, provides that a new trial may be granted ". . . for any of the reasons for which new trials have heretofore been granted in actions at law in any of the courts of the United States. . . ." Failure of the proof to support a verdict was a cause for granting a new trial prior to the adoption of Rules 50 and 59, and we submit that courts have not been denied the right to grant a new trial for that reason under the new rules. Under Rule 50 the court **may** direct a verdict but **it is not required** to do so if it believes that a new trial would be in the best interest of justice.

It is a general rule that a verdict will not be directed but a new trial will be granted if it appears that the ends of justice would best be served by such a course. 5 C. J. S., Appeal and Error, Sec. 1933, Page 1445, and 3 Am. Jur., Appeal and Error, Section 1204, Page 707.

The rule is stated in Am. Jur. as follows:

> "A reviewing court possessing authority to render final judgment or direct the trial court to do so may render final judgment on the reversal of a judgment for the plaintiff on the ground of insufficiency of the evidence to support it, and will exercise this power if the evidence is manifestly insufficient, and it does not appear that any new evidence can be procured on a retrial of the cause. But if the court is of the opinion that other evidence may be produced on a new trial, or is unable to say that such evidence may not be produced, it will not

render final judgment, but will remand the case for a new trial."

The case having been remanded to the District Court for its action Respondents were entitled to notice before action was taken and judgment entered under the provisions of Rules 6 (d), 5 (a) and 55 (b), Rules of Civil Procedure. Petitioner has been able to cite no case in which it was ruled that the opposite party is not entitled to notice of the entry of judgment after a prior judgment has been reversed on appeal.

There are many reasons for the rules providing for notice. Each case may present a different ground requiring notice to the opposite party of an entry of a judgment in order that justice may be done. As pointed out in the opinion sought to be reviewed there is in this case an outstanding reason why Respondents were entitled to notice of the motion for entry of judgment on the mandate. When this case was considered by the Fifth Circuit Court of Appeals on the first appeal, No. 10247 on the docket of that Court, the sole and only question passed upon by the Court was whether Ewell and Neyland were employees of Capital City Press. The Court stated that " . . . recovery depended upon whether a case of liability against the Press was made out". (R. 5).

But subsequent to the hearing of this case on the first appeal by the Circuit Court of Appeals the Supreme Court of Louisiana declared the law of Louisiana to be such that petitioner under the terms of its policy would be liable **as insurer of Ewell,** and, therefore, liable regardless of whether or not Ewell was a servant of the Press. This law was announced in *LeBlanc vs. New Amsterdam Casualty Company,* 13 So. 2d 245. The opinion of the Circuit Court of Appeals, which petitioner asks Your Honors to review, mentions this *Leblanc* case (R.

42). Had that case been decided and called to the attention of the Court of Appeals it would have been compelled to affirm the original judgment, because under the *LeBlanc* case, petitioner under the terms of its policy is the insurer of Ewell and proof of master and servant is unnecessary.

The state law is controlling even though it is declared or altered after judgment in a District Court and at any time before the case is finally disposed of. *Huddleston vs. Dwyer,* — U. S. ———, 88 Law Edition (Advance Sheet No. 15) page 933, 64 S. Ct. Reporter, 1015 (not yet reported in bound volume). The case having been remanded by the Court of Appeals for further proceedings was still sub judice and the duty rested upon the Federal Court to apply the state law in accordance with the controlling decision of the highest court of the state in existence at the time the last federal court passed upon the case. The state law applicable to this case having been declared contrary to the declaration made by the Court of Appeals and after the Court of Appeals had remanded the case, the District Court is compelled to follow the law as declared by the state court and not as declared by the Court of Appeals. Therefore, any action taken by the District Court after the decision of the *LeBlanc* case must be in conformity therewith. If after the case was remanded to the District Court action taken by the District Court was in conformity with the *LeBlanc* opinion, the court could not be said to be acting inconsistent with the mandate because the District Court is now bound by the law as declared by the state which is contrary to the construction placed upon it by the Court of Appeals prior to the declaration of the state court.

This rule has very recently been clearly stated by this Court in the *Huddleston* case *supra,* 88 Law Edition, 1. c. 935, where this Court said:

"State law is the controlling rule of decision in this case as to both substantive and procedural rights of the parties. Erie R. Co. v. Tompkins, 304 US 64, 82 L ed 1188, 58 S Ct 817, 114 ALR 1487, Federal Rules of Civil Procedure, Rules 69 (a), 81 (b), 28 USCA following Para. 723 (c), 8 FCA 1937 ed title 28, Appx 3, pp 741, 747. It is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision. Meredith v. Winter Haven, 320 US 228, ante 1, 64 S Ct 7. And a judgment of a federal court ruled by state law and correctly applying that law as authoritatively declared by the state courts when the judgment was rendered, must be reversed on appellate review if in the meantime the state courts have disapproved of their former rulings and adopted different ones. 'Until such time as the case is no longer subjudice, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court.' Vandenbark v. Owens-Illinois Glass Co. 311 US 538, 543, 85 L ed 327, 330, 61 S Ct 347."

In view of the decision of the *LeBlanc* case, *supra*, and the *Huddleston* case, *supra*, it would now be proper when the case is called before the District Court for that Court to re-enter the judgment for plaintiff, because the same is now authorized under the law of the State of Louisiana as declared in the *LeBlanc* case. Such action would not be in conflict with or in violation of the decision of the Court of Appeals which was rendered prior to the declaration of the Louisiana law in the *LeBlanc* case.

In any event Respondents were entitled to present the *LeBlanc* case to the District Court for the purpose of having it determine the effect of the *LeBlanc* case upon the case at bar before it entered judgment in this case. As stated by the Court of Appeals Respondents were entitled to notice before judgment was entered in order that they might have the opportu-

nity to present this matter to the Court. This case demonstrates the value and reason for the Rules of Civil Procedure requiring notice before a motion is acted upon or judgment entered.

For the foregoing reasons we respectfully urge: that there is no error in the judgment of the Court of Appeals sought to be reviewed; that Respondents were, as found by the Court of Appeals, entitled to notice and an opportunity to be heard upon the matter of entering judgment upon the mandate of the Court of Appeals. The only way that error can be found in the decision of the Court of Appeals is to hold that under the Rules of Civil Procedure an Appellate Court is never, *under any circumstances,* empowered to grant a new trial when it finds that the verdict is not supported by the evidence, but that in such event judgment must be automatically entered for the defendant. Such, we submit, is not the provision of the Rules. Such constructions would hamper and retard the free administration of justice and defeat the prime purpose of the Rules of Civil Procedure.

We respectfully submit that the writ should be denied.

Respectfully submitted,

PAUL M. PETERSON,
Columbia, Missouri,

Counsel for Respondents,
Lyman Fleniken and Mrs.
Lyman Fleniken.

BERT E. DURRETT,
CALVIN E. HARDIN, JR.,
Baton Rouge, Louisiana,

BOYLE G. CLARK,
LEE CARL OVERSTREET,
Columbia, Missouri.

Of Counsel for Respondents.